

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

In the Matter of

Skype Communication's Petition to Apply  
*Carterfone* Attachment Regulations to the  
Wireless Industry

RM – 11361

**REPLY COMMENTS OF AT&T INC. OPPOSING  
SKYPE COMMUNICATION'S PETITION TO APPLY *CARTERFONE*  
ATTACHMENT REGULATIONS TO THE WIRELESS INDUSTRY**

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## INTRODUCTION AND SUMMARY

The comments submitted in this docket overwhelmingly confirm that Skype's petition to apply *Carterfone*<sup>1</sup> attachment regulations to the highly competitive wireless industry is deeply flawed in multiple respects: it misconceives the purpose and effect of *Carterfone*; it advocates aggressive regulatory intervention in an industry that is both highly competitive and nascent; and it is simply wrong on the facts.

There is no dispute here that the *Carterfone* decision was directed at a single entity, the vertically integrated Bell system, that dominated wireline telecommunications as well as the adjacent market for telephone equipment. Today's wireless industry, by contrast, bears none of those characteristics: there is no vertical integration, there is competition from top to bottom with multiple carriers and many handset manufacturers from which consumers can choose, and there is abundant innovation and differentiation in products and services. Skype's supporters, like Skype's petition itself, fail to come to grips with these key differences, which are critical here. They mean, first, that the *Carterfone* decision does not, as Skype wrongly contends, currently apply to the wireless industry. And they also mean that the decision should not be extended to the wireless industry, where regulatory intervention would risk stifling the investment that is crucial to the deployment and uptake of 3G services. No commenter explains how that risk can be justified here, where innovation and competition have already flourished and, thus, where the goal of the proposed *Carterfone* regulatory framework has already been realized.

Beyond their failure to address the core differences between the wireline industry at the time of *Carterfone* and the wireless industry today, Skype's supporters – again, like the petition

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<sup>1</sup> Decision, *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968) ("*Carterfone*").

itself – also fail to acknowledge the established principle that regulatory intervention is appropriate only in the case of market failure. The Commission has long recognized this principle, emphasizing, in the words of Chairman Martin, that “[m]arket forces are the best method of delivering choice, innovation, and affordability to consumers,” and that the Commission should only “step in and take action” where there are “market failures.”<sup>2</sup> Neither Skype nor its supporters have come close to demonstrating the existence of any market failure. The wireless industry – including in particular the 3G networks on which Skype’s petition focuses – exhibits all the signs of robust competition: pronounced subscribership growth, enormous capital investment, breathtaking innovation, declining prices, and expanding usage. Comments from all corners confirm both the competitive state of the wireless industry and the failure of Skype and its supporters to carry their burden of establishing a market failure that would justify the regulation they seek.

Finally, the comments also confirm that Skype’s petition is replete with glaring factual errors that fundamentally undermine its call for regulation. Nothing in the record substantiates Skype’s charge that carriers disable handset functionalities or prohibit applications for anticompetitive purposes.<sup>3</sup> On the contrary, the record makes clear that Skype’s descriptions of these practices are highly misleading. In instance after instance – whether relating to Skype’s claims regarding WiFi, or Bluetooth, or handset locking – the record demonstrates either that Skype has its facts wrong or, at a minimum, that the anecdotal evidence to which it points is not evidence of a market failure that would justify regulatory intervention. And the handful of

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<sup>2</sup> FCC News Release, *Press Statement of Commissioner Kevin J. Martin on the Commission’s Decision on Verizon’s Petition for Permanent Forbearance from Wireless Local Number Portability Rules* (July 16, 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-224368A4.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-224368A4.pdf).

<sup>3</sup> See Pet. at 32.

additional practices that Skype's supporters target only serve to confirm that different carriers have adopted different policies, with the overriding pro-consumer objective of providing high-quality service and protecting wireless networks from harm.

## DISCUSSION

### I. *CARTERFONE* HAS NO APPLICATION TO THE WIRELESS INDUSTRY

Despite the array of commenters participating in this proceeding, two critical points are not in serious dispute. First, the *Carterfone* decision itself represented an exercise of the Commission's authority under 47 U.S.C. §§ 201 and 202 to adjudicate the reasonableness of a wireline tariff that barred foreign attachments to the wireline network.<sup>4</sup> Second, both the Commission and the courts have made clear that §§ 201 and 202 apply differently to the wireless industry, which is not subject to tariffing requirements in the first place, which is characterized by robust competition, and the practices of which are presumptively reasonable.<sup>5</sup> AT&T established both those points in its opening comments, no party disputes them, and, taken together, they establish that *Carterfone* does not by its terms apply to the wireless industry.<sup>6</sup>

The question here, therefore, is not whether *Carterfone* applies to the wireless industry – it plainly does not – but rather whether that decision should be *extended* to apply to the wireless

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<sup>4</sup> See *Carterfone*, 13 F.C.C.2d at 423.

<sup>5</sup> See Memorandum Opinion and Order, *Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd 8987, ¶¶ 20, 26 (2002) (“*Orloff Order*”); *Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003) (affirming *Orloff Order*); see also, e.g., Order, *Tariff Filing Requirements for Nondominant Common Carriers*, 10 FCC Rcd 13653, ¶ 3 n.13 (1995) (rates charged by a nondominant carrier are “presumptively lawful”); Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, ¶ 118 n.336 (1997) (noting that the Commission gives a “presumption of lawfulness . . . to nondominant carrier rates and practices” in cases involving alleged “violations of sections 201(b) and 202(b)”).

<sup>6</sup> See AT&T Comments at 23-25.

industry. On that question, the record before the Commission makes clear that the extension of *Carterfone* to wireless would disregard the robustly competitive nature of the industry, impose substantial and unnecessary costs with the aim of achieving a goal – competition among handset manufacturers and application developers – that has already been and continues to be realized, and contradict decades of Commission precedent regarding the circumstances that warrant regulatory intervention.

**A. The Wireless Industry Is Robustly Competitive**

1. *Carterfone* was a monopoly-era regulatory regime, designed to jumpstart innovation in the vertically integrated CPE market, that has no application to an industry – today’s wireless industry – that is robustly competitive and that already exhibits the very innovation that *Carterfone* hoped to achieve. Particularly when compared to the state of play in the wireline industry at the time of *Carterfone*, the degree of competition in the wireless industry – and the extent to which competition pervades all aspects of the industry, from service providers to handset manufacturers to application developers – is itself sufficient to establish that *Carterfone* attachment regulations should not be extended to the wireless marketplace.

The facts surrounding the Commission’s adoption of *Carterfone* in the wireline industry are not in dispute. At the time, the Bell system had a legally sanctioned monopoly over local exchange service in most of the country; it was as a practical matter the only provider of long-distance service; and it dominated the market for CPE, making “virtually every telephone used in America.”<sup>7</sup>

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<sup>7</sup> Steve Coll, *The Deal of the Century: The Breakup of AT&T* 9 (1986); *see also id.* at 11 (“[b]efore *Carterfone*, AT&T had owned virtually every residential telephone and business switchboard in the country”); *see* AT&T Comments at 26-27.

The wireless industry, by contrast, is fiercely competitive, with no single provider possessing, in *any* aspect of the industry, a market position that even remotely resembles the Bell system's position in *every* aspect of the wireline industry at the time of *Carterfone*. Virtually every potential wireless subscriber in the country has a choice of wireless providers, and the vast majority have a wealth of choices, including the four national wireless carriers, a number of regional carriers, and numerous MVNOs.<sup>8</sup>

The choices that customers have – and the resulting competition among wireless providers to sign up subscribers – provide the lens through which the Commission should view all issues raised in this proceeding. Consumer choice in the industry is driving investment, innovation, aggressive efforts to compete on price, and increasing service quality. And the results of this competition are unmistakable: subscribership is expanding rapidly, minutes of use are increasing, and wireless prices are declining.<sup>9</sup> Today's wireless marketplace, in short, bears no resemblance to the monopoly conditions of the wireline industry at the time of *Carterfone*, and the record in this docket confirms it.<sup>10</sup>

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<sup>8</sup> See Eleventh Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 21 FCC Rcd 10947, ¶¶ 25-28 (2006) (“*Eleventh Competition Report*”); AT&T Comments at 5-6.

<sup>9</sup> See AT&T Comments at 6-8.

<sup>10</sup> See Motorola Comments at 3 (emphasizing “continued rollout of differentiated wireless pricing plans”); T-Mobile Comments at 12 (similar); CTIA Comments at 10-12 (similar); T-Mobile Comments at 13 (emphasizing competition to increase call quality); CTIA Comments at 15-16 (similar); Verizon Wireless Comments at 8-9 (emphasizing carriers’ aggressive 3G deployments); Qualcomm Comments at 8 (similar); Sprint Comments at 5-6 (similar); T-Mobile Comments at 17 (similar); Qualcomm Comments at 8-9 (emphasizing churn); *id.* at 5-6 (noting that Commission’s recent wireless spectrum auction and upcoming 700 MHz auction will further drive competition); CTIA Comments at 8 (similar); T-Mobile Comments at 12 (similar); *see generally* Motorola Comments at 2-3 (describing how competitive state of wireless industry “bears no resemblance” to wireline industry at time of *Carterfone*); Qualcomm Comments at 4-5 (describing competitive state of wireless industry as “polar

Nor is there any plausible claim that, even as wireless service providers aggressively compete in the marketplace, wireless handset manufacturers do not. LG Electronics – a handset manufacturer – emphasizes (at 2) that it faces vigorous competition from “Motorola, Nokia, Palm, RIM, Samsung, Kyocera, Sony-Ericsson and others.” For its part, Motorola explains (at 4) that wireless providers offer “consumers a wide variety of devices from a large number of manufacturers.” T-Mobile, in turn, observes (at 14-15) that “[i]ntense competition among approximately 40 different manufacturers has yielded hundreds of handset models.” And Verizon Wireless points out that in the United States “there are currently more than 800 wireless phones and devices available to consumers, from nearly three dozen manufacturers.”<sup>11</sup> The manufacturing of wireless handsets today is therefore nothing like the single-source market for CPE that existed at the time of *Carterfone*.

Competition in the wireless industry has also given rise to innovation. AT&T’s opening comments identified numerous innovations in functionality, content, and applications for the mobile environment.<sup>12</sup> Other commenters similarly make clear that Skype’s claim of an “innovation bottleneck” is, at best, uninformed. Verizon Wireless points out, for example, that Motorola recently unveiled the MotoRAZR maxx Ve, which comes equipped with EV-DO for data, an FM radio, Bluetooth, and a 2-megapixel camera, while Sprint is engaged in a joint venture with cable operators to market handsets that will allow consumers to control remotely

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opposite” of monopoly environment at time of *Carterfone*); Sprint Comments at 19-20 (arguing that state of competition today makes *Carterfone* a “deeply flawed” analogy).

<sup>11</sup> Verizon Wireless Comments at 11 (citing Phone Scoop, <http://www.phonescoop.com/Phones/>); *see also* Sprint Comments at 4-5 (noting that handset market is “flooded” with vendors “offering almost every conceivable combination of devices”).

<sup>12</sup> *See* AT&T Comments at 9-10, 14-16.



digital video records, access cable guides, and obtain email from a broadband account.<sup>13</sup> As U.S. Cellular Corporation explains (at 3), “U.S. wireless customers have access to an ever growing number of optional voice and data services, pricing plans, and network improvements.” This is manifestly not an industry in which a regulatory edict is needed to drive innovation; the desire to win new customers provides all the incentive that is needed.

In short, the record compiled in this proceeding puts beyond serious question that there is no market failure that would warrant the monopoly-era regulatory mandate that Skype seeks. As Motorola puts it (at 6), in the wireless industry, “regulatory fiat is not required in order to create competition or ensure customer choice or innovation.”

2. The commenters supporting Skype’s petition are tellingly silent on this Commission’s consistent findings regarding the competitive conditions of the wireless industry. Commenters make no attempt, moreover, to show that any indicia that might plausibly be said to reveal limited competition – rising prices, declining output, or slowed innovation – are present in the wireless industry. And the arguments they do make have already been addressed or are otherwise unconvincing.

Some commenters – such as Consumers Union (at 11-12) and NASUCA (at 3) – argue that the wireless marketplace is becoming more consolidated, especially, they say, since 1992 when the Commission issued the *CPE Bundling Order*.<sup>14</sup> That claim is misleading: at the time of the *CPE Bundling Order*, mobile service was a regulated duopoly in each geographic market;

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<sup>13</sup> See Verizon Wireless Comments at 12.

<sup>14</sup> Report and Order, *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 (1992) (“*CPE Bundling Order*”).

now, more than 90% of the public has a choice of at least *four* wireless providers.<sup>15</sup> By any measure, competition is therefore far more robust today than in 1992.

Beyond that, whatever the differences in conditions between 1992 and the present, the Commission has found that the wireless industry, today, “[will] continue[] to behave and perform in a competitive manner.”<sup>16</sup> As explained in the attached paper of Dr. Marius Schwartz, industry concentration is only a “starting point for a competitive analysis,” and a litany of factors – such as the number of wireless providers, rapid development of 3G networks, comparative advertising, subscriber churn, and price cutting – all make clear that competition is thriving.<sup>17</sup>

Other commenters cite as “evidence” of an alleged lack of competition that wireless carriers are the primary source through which consumers purchase wireless handsets, which purportedly allows carriers to “dictate handset design and features.”<sup>18</sup> That carriers sell handsets hardly proves the absence of competition among wireless services or handsets, any more than the fact that car dealers sell tires proves the absence of competition in the automobile industry. In any event, these commenters ignore the fact that handsets are available through a variety of channels, including manufacturers’ websites and stores, independent wireless retail stores, “big-box” consumer electronic stores (such as Best Buy and Circuit City), and secondary markets

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<sup>15</sup> Kevin J. Martin, Chairman, FCC, *Written Statement Before the Senate Committee on Commerce, Science and Transportation* at 3 (Sept. 12, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267390A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267390A1.pdf); see also Sprint Comments at 3 (noting that the Commission in 1992 found bundling appropriate despite existence of regulated duopolies and that no wireless service was available in many areas)

<sup>16</sup> *Eleventh Competition Report* ¶ 2.

<sup>17</sup> See Marius Schwartz & Federico Mini, *Hanging Up On Carterfone: The Economic Case Against Access Regulation in Mobile Wireless* 3-9 (May 2, 2007) (“Schwartz & Mini”). Dr. Schwartz’s paper, which is attached hereto, is a response to Professor Timothy Wu’s paper, *Wireless Net Neutrality: Carterfone and Consumer Choice in Mobile Broadband*, on which Skype’s petition relies in part and which was attached to the comments of the Public Interest Spectrum Coalition.

<sup>18</sup> Public Interest Spectrum Comments at 2-3.

(such as eBay). That consumers elect to purchase handsets from carriers is not a sign of market failure: it instead reflects that many consumers prefer one-stop shopping and that carriers offer subsidized prices for handsets purchased in connection with service plans. Those subsidies, moreover, are overwhelmingly pro-consumer and pro-competitive: they drive wireless subscribership and handset penetration and have proven to be enormously popular.<sup>19</sup>

In addition, whatever entity sells the handsets, the point is that in a competitive market the choice of which handsets to sell will closely track consumer preferences: carriers that fail to offer handset models or functionalities that consumers want will be disciplined by the market.<sup>20</sup> No commenter offers any evidence that carriers can successfully force customers to purchase handsets that they do not want. Indeed, that is the very argument that a federal court – reviewing an enormous, heavily litigated record – rejected in *Wireless Antitrust Litigation*,<sup>21</sup> a case that none of Skype’s supporters even mentions here.

The handset manufacturers themselves confirm that the wireless industry, including handset manufacturing, is characterized by innovation, a wealth of consumer choices, and competition. LG Electronics and Motorola, for example, oppose Skype’s petition, explaining that “competition in wireless” encompasses both “traditional voice service” and “mobile data

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<sup>19</sup> See AT&T Comments at 56-58; see also AT&T Decl. ¶¶ 15-17.

<sup>20</sup> See AT&T Comments at 29-30.

<sup>21</sup> See *In re Wireless Telephone Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 417 (S.D.N.Y. 2005) (“*Wireless Antitrust Litigation*”) (finding that no wireless carriers have “sufficient power in the market for wireless service to ‘force’ consumers . . . to purchase unwanted handsets”).

services and applications” and that consumers can choose from among “differentiated wireless pricing plans” and “a wide variety of devices from a large number of manufacturers.”<sup>22</sup>

Some commenters suggest that, despite the number of competitors in the marketplace, carrier practices inhibit customers from freely switching carriers.<sup>23</sup> But commenters once again cite no evidence supporting their claim. The Commission has consistently found that “[c]onsumers continue to pressure carriers to compete on price and other terms and conditions of service by *freely switching providers* in response to differences in the cost and quality of service.”<sup>24</sup> As AT&T has explained, the federal court in *Wireless Antitrust Litigation*, on the basis of such findings, rejected the same claim made here, explaining that “statistics compiled by the FCC show, whatever attempts the defendants have made to address churn [through handset policies], those efforts have been to a significant degree futile.”<sup>25</sup> Furthermore, consumers who want to retain maximum flexibility to switch carriers at a moment’s notice without penalty can choose service plans, discussed further below, that permit them to do so.<sup>26</sup> In short, contrary to commenters’ unsupported allegations, subscribers can and do switch carriers in response to differences in price, quality of service, and carriers’ practices, which in turn ensures that carriers have every incentive to provide functionalities, applications, and access to content that consumers want.

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<sup>22</sup> Motorola Comments at 3-4; *see also* LG Electronics Comments at 3 (manufacturers have the “freedom and flexibility” to manufacture wireless handsets that will appeal to consumers).

<sup>23</sup> *See* NASUCA Comments at 3; Public Interest Spectrum Comments at 4.

<sup>24</sup> *Eleventh Competition Report* ¶ 4 (emphasis added); *see* Qualcomm Comments at 8-9.

<sup>25</sup> 385 F. Supp. 2d at 430; *see also id.* at 412 (citing and discussing Commission churn data).

<sup>26</sup> *See infra* p. 28 (discussing prepaid and no-contract service plans).

The Public Interest Spectrum Coalition nonetheless asserts (at 8) that there are (unidentified) limits to competition because of carrier practices that are “common to the entire industry.” That claim is wrong on the facts: as the record establishes, carrier practices with respect to applications, content, and functionalities vary widely.<sup>27</sup> In any event, as Dr. Schwartz points out, given the high level of competition in the industry – as well as the extremely sophisticated businesses that compete in the industry – any convergence on an industry practice would mean only that the practice in question is efficient, and that regulations compelling contrary behavior would impose substantial costs.<sup>28</sup>

Finally, Consumers Union argues (at 8-9) that wireless broadband is not properly considered in connection with other broadband platforms such as wireline and cable modem service, in part because wireline providers lack the incentive to deploy robust 3G capabilities and thereby undercut their DSL service offerings. That claim is economically illogical. Regardless of whether AT&T standing alone would have an incentive to risk decreased DSL sales by increasing wireless broadband offerings, many of AT&T’s wireless competitors – such as T-Mobile and Sprint – share no such concern, and those companies’ efforts to deploy 3G capabilities mean that AT&T must do the same to compete. Beyond that, the assertion flies in the face of the extraordinary level of investment that AT&T and other carriers, including carriers with wireline affiliates, have made in their 3G networks.<sup>29</sup>

Consumers Union’s broader point about the supposed lack of substitutability of wireless and wireline broadband services is also wide of the mark: although wireless broadband service

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<sup>27</sup> See, e.g., AT&T Comments at 11-12 (describing different carriers’ locking policies); *id.* at 51-52 (describing AT&T’s Bluetooth policies).

<sup>28</sup> See Schwartz & Mini at 17-24; *see also* Verizon Wireless Comments at 7-8.

<sup>29</sup> See AT&T Comments at 13-15.

may face unique capacity and network management constraints as well as varying speed capabilities, it does not follow that such service is not a substitute for broadband service provided over other platforms. Wireless broadband service affords customers distinctive advantages in terms of mobility, with some drawbacks in terms of functionality; wireline service, in contrast, offers some advantages in terms of functionality, with drawbacks in terms of mobility. That there are tradeoffs in choosing between wireless and wireline broadband does not mean that one does not compete with the other. Rather, one service can constrain the price of another so long as the two are considered reasonably interchangeable by “marginal” customers.<sup>30</sup> That is unquestionably the case here, where wireless broadband – notwithstanding the limitations that come with the wireless medium – presents consumers a viable broadband alternative with the advantage of mobility that other platforms cannot offer.

## **B. Application of *Carterfone* Would Impose Substantial Costs**

1. Apart from the competitive state of the wireless industry, *Carterfone* is an inapt regulatory model for the wireless industry because the practices that are the focus of Skype’s petition are necessary to ensure the efficient and economical management of wireless networks. In view of the technological and economic complexities of regulating the emerging wireless broadband industry, intrusive regulations would threaten to throttle the very competitive forces that are driving investment, innovation, and growth in 3G services.<sup>31</sup>

As AT&T has explained, and as Dr. Schwartz emphasizes in the attached paper, *Carterfone* and its progeny came about when the wireline telecommunications market was

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<sup>30</sup> In the voice context, the Commission has explained that for competing technologies to constrain each other’s prices “only requires that there be evidence of sufficient substitution for significant segments of the mass market,” not that every customer views the two services as substitutes. Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 91 (2005).

<sup>31</sup> See AT&T Comments at 13-15.

mature and the technology associated with the telephone network was relatively static and well-understood: in those circumstances, the risk of adopting imperfect regulations, or regulations that would soon be rendered obsolete as a result of technological change, was minimized.<sup>32</sup> Skype, by contrast, is requesting comprehensive standards, written and overseen by the Commission, governing how carriers, manufacturers, and application developers interact. As AT&T has explained, given the nascent state of the industry, the problems of imperfect information, and the complexity of the endeavor, the likelihood that the Commission could get those standards “right” is miniscule.<sup>33</sup> And, even in the unlikely event that the Commission was able to devise a set of rules that, when adopted, optimally addressed industry circumstances, the rapid pace of change in the nascent wireless broadband industry would soon render those rules obsolete and inefficient.<sup>34</sup>

The record confirms this point. Motorola, for example, points (at 7) to the number of different technologies used to provide wireless (including wireless broadband), observing that those varying technologies continue to evolve rapidly, further complicating regulatory standardization efforts.<sup>35</sup> T-Mobile similarly explains (at 23-24) that “wireless technology has been in constant flux from its inception,” which will “doom[]” regulatory efforts to establish technology standards. The alternative, T-Mobile states (at 24), would be to “freeze technology in place” at a time when consumer demand is pushing for new technological developments.

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<sup>32</sup> *See id.* at 33; *see* Schwartz & Mini at 28-29.

<sup>33</sup> *See* AT&T Comments at 34-35.

<sup>34</sup> *See* Schwartz & Mini at 2 (risk that regulation will impose “collateral damage” is “particularly likely when . . . the industry is technologically complex and rapidly changing”).

<sup>35</sup> *See also* MetroPCS Comments at 13-16 (describing daunting technological challenges that would face any standardization regime).

Equally important, the comments establish that the wireless spectrum is a shared and finite resource, in which subscribers' uses can have real and significant effects on wireless networks as a whole.<sup>36</sup> In light of the reality of limited spectrum, carriers must design and manage their networks to perform as efficiently as possible in order to provide the first-rate service quality and innovative services that the market demands. Handset and application certification procedures are absolutely critical to that end, and, as Dr. Schwartz and others note, the imposition of regulatory constraints on those procedures would thus necessarily prove costly and diminish efficiency.<sup>37</sup> AT&T's handset certification procedures, for example, ensure that handsets used on AT&T's network are optimized for the network, which increases the quality of the user's experience and reduces negative effects on the network as a whole.<sup>38</sup> The converse is that constraints on AT&T's handset certification procedures would increase the incidence of handsets on AT&T's network that are not optimized, which would in turn diminish the quality of service not only for the users of those handsets but for other customers as well. Similarly, application certification, as Motorola explains (at 11), guards against "traffic congestion and other consumer harms that can result from certain applications. Wireless carriers must be able to manage their networks, including the types of applications their networks will support, and wireless carriers are uniquely qualified to understand the impact that particular applications have

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<sup>36</sup> See, e.g., MetroPCS Comments at 10-11; Motorola Comments at 6-9; Qualcomm Comments at 12; Sprint Comments at 19-20; T-Mobile Comments at 19-23; CTIA Comments at 38-40; Verizon Wireless Comments at 33-35.

<sup>37</sup> See Schwartz & Mini at 21; see also Thomas W. Hazlett, *Wireless Carterfone: An Economic Analysis* 12-15 (Apr. 30, 2007) (describing efficiencies of current wireless practices), attached as Exhibit A to Verizon Wireless Comments.

<sup>38</sup> See AT&T Comments at 58-60.



on their networks.”<sup>39</sup> As AT&T has explained, Skype itself recognizes the importance of certification, as it too has extensive software certification procedures.<sup>40</sup>

2. None of the commenters supporting Skype attempts to account for any of the costs that a broad regulatory regime would impose on the industry and, ultimately, on consumers. Instead, the commenters tally only the purported benefits of *Carterfone*. But those benefits are illusory: as set forth above and in AT&T’s opening comments, competition is *already* driving innovation in the wireless industry and attachment regulations would only undermine investment and innovation.<sup>41</sup> None of the claims made by any commenter is to the contrary.

*First*, some commenters repeat the claim that wireless carriers are disabling consumer-friendly functionalities and that *Carterfone* is the necessary regulatory fix.<sup>42</sup> According to these commenters, carriers have disabled features such as minutes-spent timers, MP3 playback ringtone capabilities, photo file transfer capabilities, GPS services, Bluetooth, and WiFi.<sup>43</sup> The commenters assert that these restrictions are intended to force consumers to use carriers’ services and to thwart competition from non-affiliated providers.<sup>44</sup>

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<sup>39</sup> See also Qualcomm Comments at ii.

<sup>40</sup> See AT&T Comments at 61-62.

<sup>41</sup> See *supra* pp. 4-7; AT&T Comments at 35-36.

<sup>42</sup> See Public Interest Spectrum Comments at 3.

<sup>43</sup> See *id.* (citing Professor Wu). The attached paper of Dr. Schwartz and Mini addresses these claims in detail.

<sup>44</sup> See *id.* at 3-4.

These claims, which AT&T has already largely addressed, are misinformed.<sup>45</sup> To begin with, they ignore that carriers' preeminent incentive is to provide consumers with applications and functionalities that they desire – it is those applications and functionalities that will drive demand for wireless services and thereby allow carriers to recoup their enormous investments in wireless and 3G networks.<sup>46</sup> Even a fully competitive market, however, will not produce handsets with every conceivable application or functionality: many consumers want nothing more than an inexpensive but reliable handset with a long-lasting battery that provides high-quality voice service.<sup>47</sup> Commenters' tactic of pointing to some handsets that lack certain functionalities – while ignoring others that offer those very same functionalities – does not come close to proving an industry-wide market failure; it shows only that the industry is providing a range of differentiated products targeted to different segments of consumers. In addition, these commenters, like Skype, consistently overlook that carriers' practices with respect to functionalities and applications vary substantially, which is a sign that consumers have a variety of choices and that the marketplace is working well.<sup>48</sup>

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<sup>45</sup> AT&T has already addressed claims regarding Bluetooth and WiFi. *See* AT&T Comments at 48-52. Commenters' new claims relating to photo sharing and GPS are also misinformed: AT&T, for one, has never required subscribers to upload to a paid photo-sharing website in order to be able to email pictures from a handset, and, in fact, AT&T encourages sideloading of photos via Bluetooth. *See id.* at 50-51. In addition, AT&T has introduced wireless handsets with GPS, enabling 3D maps and searching capability. *See id.* at 20.

<sup>46</sup> *See id.* at 15.

<sup>47</sup> *See id.* at 31; *see also* Schwartz & Mini at 1.

<sup>48</sup> Consumers Union asserts (at 4) that wireless carriers limit features for “no apparent reason other than to maintain the carriers' revenue stream.” For the reasons stated in AT&T's opening comments, that is not so: the practices identified by Skype serve legitimate business purposes, including the reasonable management of wireless networks. *See* AT&T Comments at 48-63. And, as other commenters point out, revenue-protection justifications – even had they been substantiated here – are not evidence of a market failure, but rather are evidence that the business model that Skype wishes to impose on the industry is not efficient. *See* Verizon Wireless Comments at 7 & n.8. That is, Skype is seeking to free-ride on the billions of dollars in

*Second*, some commenters contend that the Commission should revisit its *CPE Bundling Order* and hold that carriers' "bundling" of handsets with services should be allowed only when services are offered separately on a non-discriminatory basis. NASUCA, for example, contends (at 7) that the *CPE Bundling Order* was based on the Commission's view that there was no evidence that carriers refused to provide service to those who purchase another brand of CPE. But, according to some commenters, that is not the case today: "carriers have largely ignored the requirement [of the *CPE Bundling Order*] to offer service separately."<sup>49</sup>

These claims are mistaken. Although most customers *choose* to purchase handsets bundled with service, they are not as a rule forced to do so.<sup>50</sup> Thus, for example, while AT&T offers a large portfolio of handsets for purchase along with wireless service, AT&T does not *require* customers to buy a handset in order to get service. In fact, consumers can purchase AT&T's services on a month-to-month basis without a handset, can purchase handsets (or computers equipped to provide wireless broadband) from retail outlets and then later sign up for AT&T's service, or can make such purchases from authorized AT&T sales agents.<sup>51</sup> AT&T also certifies for use on its network devices and integrated business solutions that are not branded or sold through its distribution channels. AT&T works with more than a dozen resale partners and certifies a number of products that are offered solely by those resellers. In addition, AT&T works with the largest laptop manufacturers in the world to certify wireless-enabled laptops

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investment in wireless networks made by carriers, and if it is allowed to do so would deter future investment and innovation. *See* MetroPCS Comments at 9-10; Qualcomm Comments at 10-11; Verizon Wireless Comments at 1-3.

<sup>49</sup> Public Interest Spectrum Comments at 2.

<sup>50</sup> *See, e.g.*, Sprint Comments at 18-19 (noting that customers can purchase service separately from handsets but overwhelmingly choose discounts that come with bundling).

<sup>51</sup> *Accord* Mark Lowenstein, *Implications of the Skype Petition for Wireless Carriers and Consumers* 1 (Apr. 30, 2007) (noting various distribution channels for wireless handsets), attached as Exhibit B to Verizon Wireless Comments.

offered by these manufacturers directly to consumers. Over the last 18 months, AT&T has certified more than 40 non-branded, non-stocked devices that consumers can purchase through alternate sources. AT&T thus provides consumers with the option of purchasing wireless service separately from a wireless handset. That most consumers chose instead the subsidized handsets that accompany the purchase of wireless service is hardly a problem in need of a regulatory fix.

Moreover, apart from the fact that AT&T does in fact comply with the terms of the *CPE Bundling Order*, it is far from clear that the concerns animating that order remain pertinent. The Commission has already held that when, as here, a supposed “tying” product market is “competitive,” there are virtually no anticompetitive concerns associated with product bundling and thus no reason to interfere with the “public interest benefits” that come from such bundling.<sup>52</sup> Bundling, the Commission has explained, eliminates “transaction costs” and thus results in lower prices; it facilitates “consumer choice” by spurring intermodal competition; and it encourages deployment and adoption of “new, advanced, or specialized services” by “offering consumers the choice of purchasing packages of products and services at a single low-rate.”<sup>53</sup> All of these advantages are present in the wireless industry, and all of them benefit consumers. And, because there is robust competition among service providers, it is impossible to see how bundling service with handsets – even if it were mandatory, as commenters wrongly claim – could result in competitive harm.<sup>54</sup>

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<sup>52</sup> Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Market*, 16 FCC Rcd 7418, ¶¶ 10-12 (2001).

<sup>53</sup> *Id.* ¶ 10.

<sup>54</sup> Some commenters suggest that the Commission should require wireless carriers to offer service-only plans that offer cheaper rates because of the lack of a handset subsidy. *See, e.g.,* Mobile Industry Executives Comments at 4. But the *CPE Bundling Order* does not impose that obligation, and there is no basis in the record for concluding that the Commission should impose such a requirement, which is tantamount to rate regulation. Moreover, if such service-only plans were demanded by consumers, carriers would have every incentive to provide them.

*Third*, a few commenters claim that Skype's petition does not go far enough, and assert without explanation that the Commission not only should regulate applications and handsets at the network edge, but also should interfere with how carriers manage traffic in the core network.<sup>55</sup> Here again, these commenters point to no evidence of a market failure that would warrant such comprehensive regulatory control over wireless networks. Absent evidence of an industry-wide practice that is working to the detriment of consumers – and there is, quite literally, no such evidence here – the Commission should reject the call for such extraordinary regulation out of hand.

Moreover, these commenters make no effort to gauge the enormous costs of such pervasive Commission control over how carriers design their networks and manage the traffic that rides over them. Many of the enhanced features of AT&T's wireless services arise from innovation and capabilities at the core of AT&T's network, in addition to innovation that has occurred at the network's edge (that is, innovation in handsets, functionalities, and applications).<sup>56</sup> As AT&T explained in its opening comments, it is in the midst of a multi-billion dollar deployment of UMTS/HSDPS technology that, to date, permits AT&T to offer high-speed 3G service in more than 160 markets in the U.S. As a result of this deployment, customers can now more quickly access email, browse the web, connect to business applications, and choose new video services. Furthermore, AT&T's wireless network is layered with Intelligent Network

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A regulatory mandate to provide such plans, however, would decidedly undermine consumers' interests: requiring carriers to offer discounts or subsidies on *all* service plans when they offer such discounts or subsidies on *some* plans would create substantial and perverse disincentives to offering any discounts or subsidies in the first place.

<sup>55</sup> See, e.g., Public Interest Spectrum Comments at 7.

<sup>56</sup> See CTIA Comments at 26 (noting that ability “to continue improving and adding intelligence to the network itself . . . has allowed the wireless industry to continue to push the envelope of innovation and to better serve customers”); see also Lowenstein at i (noting that Skype's petition ignores the need for “coordination between the handset and the network”).

(“IN”) technologies that will support a wide array of additional innovative services. For example, using the IN capabilities built in to its 3G network, AT&T has already deployed Office Reach™ (which allows integration of fixed and wireless voice services for enterprise customers<sup>57</sup>), enhanced Push to Talk capabilities (which allow subscribers to see whether friends or family are available for calls and to make individual or group calls with the touch of a button<sup>58</sup>), and Smart Limits (which permits parents to manage children’s TV viewing and website access<sup>59</sup>). AT&T’s deployment of these and other innovative new mobile services depends on its ability to utilize network intelligence in order to obtain the most functionality from the high-speed network capability it is spending billions to deploy. Regulation of how carriers manage their network and how they integrate the network core with handsets and applications at the network edge would undermine that ability and thus inhibit the development and deployment of new services and features. Neither Skype in its petition nor its supporters in their comments have provided any evidence or rationale that could remotely justify such heavy-handed regulatory intervention.

**C. The Objectives of the Broadband Policy Statement Are Best Achieved Through Competition**

Recognizing the serious problems that attachment regulations would pose in the wireless industry, several commenters stop short of advocating *Carterfone* in this context and instead ask the Commission to extend its non-binding “broadband policy statement” to wireless broadband

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<sup>57</sup> See <http://business.cingular.com/businesscenter/business-programs/mid-large/officereach.jsp>.

<sup>58</sup> See [http://www.cingular.com/learn/ptt/?\\_requestid=33496](http://www.cingular.com/learn/ptt/?_requestid=33496).

<sup>59</sup> See <http://www.att.com/gen/sites/smartlimits?pid=8950>.

services.<sup>60</sup> But, as explained in detail above and in AT&T's opening comments, just as the goal that originally animated *Carterfone* – the promotion of competition in CPE – is already being met in the wireless industry, so too are the goals behind the broadband policy statement. Each principle of the policy statement serves the end of “ensur[ing] that broadband networks are widely deployed, open, affordable, and accessible to all consumers.”<sup>61</sup> As the record in this proceeding makes clear, competition in the wireless industry has already yielded and continues to yield unparalleled choice, innovation at all levels of the industry, rising output, declining prices, and massive investment in infrastructure and services. Market forces are thus already resulting in the robust deployment and widespread choice and innovation that are the stated objectives of the broadband policy statement. Continued reliance on market forces will best ensure that the statement's ideals continue to be realized.<sup>62</sup>

In contrast, injecting government regulation into this highly competitive industry is not only unnecessary but could cause demonstrable harm. For example, as AT&T has shown, and as the record in this proceeding confirms, new regulations requiring wireless carriers to allow customers to attach any device or to run any application of their choosing, irrespective of

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<sup>60</sup> See CEA Comments at 2; ITIC Comments at 2-4; VON Coalition Comments at 2-3, 6-8. The Commission adopted the broadband policy statement in dockets involving wireline and cable, not wireless, facilities. See Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986 (2005) (“Policy Statement”) (listing dockets relating wireline and cable facilities). In addition, the statement was first conceived in an ex parte letter of the High Tech Broadband Coalition that, by its terms, was directed at “cable modem and DSL broadband services” and made no mention of wireless. Letter from High Tech Broadband Coalition to Michael K. Powell, Chairman, FCC, Attach. at 1, CC Docket Nos. 02-33 & 02-52 (Sept. 25, 2003).

<sup>61</sup> Policy Statement ¶ 4.

<sup>62</sup> Application of the broadband policy statement in this context would thus parallel the Commission's approach to §§ 201 and 202: As noted above and in AT&T's opening comments, the Commission, affirmed by the D.C. Circuit, has concluded that §§ 201 and 202, when applied to the wireless industry, are best served by permitting competition and market forces to safeguard consumers from unreasonable carrier practices.

whether those devices or applications have been certified for use on the wireless network in question, would impose substantial costs and undermine competition and innovation in the wireless industry, by preventing carriers from optimizing service for end users.<sup>63</sup> Indeed, such regulatory intervention not only would undermine the stated goals of the broadband policy statement, but also would be inconsistent with the statement's recognition of the need for carriers to be able to manage their networks: "The principles [of the statement] . . . are subject to reasonable network management."<sup>64</sup> As AT&T explained in its opening comments and addresses further below, all of the specific practices cited by Skype and its supporters further legitimate business purposes, including, most importantly, the need efficiently to manage wireless networks to ensure the provision of innovative, high-quality services to consumers. Particularly in a competitive environment, whether the network policies any carrier adopts to that end are *reasonable* is a question best left to consumers, who can freely switch carriers in response to unreasonable policies, not to government regulators, who must rely on imperfect information and cannot adequately respond to the rapidly changing marketplace.<sup>65</sup>

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<sup>63</sup> See Qualcomm Comments at 12-13; Verizon Wireless Comments at 33-35; Motorola Comments at 11; Sprint Comments at 24.

<sup>64</sup> Policy Statement ¶ 5 n.15.

<sup>65</sup> Although the Public Interest Spectrum Coalition (at 7) points to AT&T's merger commitment to abide by the policy statement as a basis for extending the policy statement to the wireless industry, that commitment by its terms applies only to "*wireline* broadband Internet access service." Letter from Robert W. Quinn, Jr., AT&T, to Marlene Dortch, FCC, Attach. at 8, WC Docket No. 06-74 (Dec. 28, 2006) (emphasis added). Although AT&T defined its commitment to include "Wi-Max fixed wireless broadband Internet access service," *id.* at 8 n.15, no similar commitment was made for the mobile wireless broadband services that are the subject of Skype's petition. Moreover, the fact that a specific regulatory obligation is imposed on a specific company as a result of a specific license transfer means that the obligation does *not* apply to the industry more generally.



## **II. THE COMMISSION SHOULD REJECT SKYPE’S REQUEST TO INITIATE A RULEMAKING PROCEEDING**

### **A. The Practices Identified by Skype Do Not Warrant Regulatory Intervention**

AT&T’s opening comments highlighted the extraordinarily thin, anecdotal, and in most cases mistaken “evidence” on which Skype grounds its claim for a comprehensive investigation into the wireless industry.<sup>66</sup> No commenter provides any evidence to buttress Skype’s unsubstantiated assertion that carrier practices related to WiFi, Bluetooth, usage policies, handset locking, or certification procedures warrant investigation.

1. *WiFi.* Wireless carriers’ supposed practice of limiting WiFi functionality is not a basis for *Carterfone* regulation. As AT&T has explained, its decision to market the Nokia E62, rather than the Nokia E61 – the only example of supposed WiFi “crippling” identified by Skype – was driven by AT&T’s desire to develop a low-cost handset with email capability for the mass market. Indeed, as AT&T has also explained, the clearest evidence that Skype’s charge here is off-base (and irresponsible) comes from reviewing the other handsets that AT&T and other providers sell, many of which include WiFi capability.<sup>67</sup>

The record confirms that Skype’s allegation that carriers refuse to offer handsets with WiFi is baseless. The availability of WiFi handsets is expanding, and every national carrier has at least one handset with such capability.<sup>68</sup> A host of carriers – including AT&T – offer several handsets with WiFi, and at least one carrier (Verizon Wireless) is testing a CMRS/WiFi

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<sup>66</sup> See AT&T Comments at 51-63.

<sup>67</sup> See *id.* at 50; AT&T Decl. ¶ 31.

<sup>68</sup> See T-Mobile Comments at 32-33.

switching technology.<sup>69</sup> And, as Verizon Wireless points out, consumers can also purchase WiFi handsets from LinkSys and NetGear.<sup>70</sup>

2. *Bluetooth.* Nor are carriers' practices with respect to Bluetooth evidence of supposed anticompetitive practices. As AT&T has explained, carriers' practices with respect to Bluetooth vary substantially, which is itself proof that the market is working well in providing consumers a range of choices. AT&T, for one, does not disable Bluetooth functionality and in fact encourages the sideloading of music and photos that is enabled by certain Bluetooth capabilities.<sup>71</sup>

Here too the record confirms that Skype's claims regarding Bluetooth are misinformed and unpersuasive.<sup>72</sup> T-Mobile explains (at 34) that 26 of the 37 handsets available from T-Mobile include Bluetooth functionality. Verizon Wireless emphasizes (at 20) that its policies with respect to Bluetooth file-transfer capabilities are driven by concerns about access to personal information and exchange of copyrighted information. Nothing in any of the comments remotely supports the view that carriers' varying practices with respect to Bluetooth warrant a Commission investigation.

3. *Locking and Handset Subsidies.* The record also bears out that wireless carriers' locking policies vary and are an efficient and pro-consumer practice.<sup>73</sup> Consumers Union asserts (at 2), without citation to any supporting material, that consumers are "troubled" by the fact that "they cannot take their phones with them when changing wireless providers," and NASUCA

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<sup>69</sup> See CTIA Comments at 18; see also Verizon Wireless Comments at 18-20.

<sup>70</sup> See Verizon Wireless Comments at 20.

<sup>71</sup> See AT&T Comments at 51-52; AT&T Decl. ¶ 33.

<sup>72</sup> See AT&T Comments at 51-52.

<sup>73</sup> See Verizon Wireless Comments at 22; T-Mobile Comments at 35.

declares (at 2-3) that “it should be up to the wireless carriers” to justify locking policies. As AT&T has explained, however, Skype and others have their facts about locking wrong: AT&T, for example, will generally provide the capability to unlock the handsets it currently sells when a service commitment or contractual obligation has been fulfilled, assuming that the manufacturer permits and enables the carrier to do so.<sup>74</sup> More importantly, the record establishes that consumers have basic *choices* with respect to purchasing handsets – that is, consumers can purchase phones without a subsidy and service commitment that generally can be immediately unlocked – but that most consumers choose the subsidized price that comes with a service commitment and a locked handset.<sup>75</sup> That marketplace evidence – regarding what consumers actually purchase when given the choice – is far more persuasive than commenters’ bare assertions regarding what “troubles” customers, and it thoroughly discredits the claim that subsidized phones and the handset locking that comes with them is somehow anti-consumer or anticompetitive.

4. *Usage Policies.* AT&T established in its opening comments that its usage policies are vital to management of its wireless network.<sup>76</sup> AT&T’s build-out of its network is based on assumptions regarding usage, including that most consumers will use their wireless handsets for services that are optimized for mobile use – including voice service, messaging (including text-messaging, MMS, and IM), email access, and limited web-browsing.<sup>77</sup> The capacity that AT&T builds into its network, as well as the rates that AT&T charges, are based on that assumption.

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<sup>74</sup> See AT&T Comments at 11-12; see also AT&T Decl. ¶ 17 (discussing AT&T’s unlocking policies).

<sup>75</sup> See AT&T Comments at 22.

<sup>76</sup> See *id.* at 52-55.

<sup>77</sup> See AT&T Decl. ¶ 46.

Because wireless spectrum is a limited and shared resource, AT&T has a responsibility to ensure that individual consumers do not compromise the reliable and high-quality service that AT&T seeks to provide to all its subscribers. To that end, AT&T offers services and rate plans designed for specific usage profiles, and it has adopted usage policies aimed at limiting the use of bandwidth-inefficient applications that are not optimized for the wireless environment and thus are not captured in those profiles. Such applications consume a disproportionate amount of bandwidth and therefore may affect the quality and reliability of use by other subscribers in the same geographic area.<sup>78</sup> As Qualcomm explains (at 12-13), it would be “irresponsible” for wireless carriers to allow a minority of subscribers to engage in bandwidth-inefficient uses and thereby to threaten the reliability of the network for other users.<sup>79</sup>

No commenter seriously challenges that conclusion or the basic realities surrounding shared wireless spectrum. Some commenters, however, complain that wireless service contracts “frequently contain substantial limitations on permitted uses which are not well-advertised to customers.”<sup>80</sup> But, like other carriers, AT&T faces a market imperative to ensure that consumers are adequately informed of AT&T’s policies, and AT&T therefore goes to great lengths to ensure that customers are apprised of all information relevant to their service, including AT&T’s usage policies. In this respect, AT&T provides customers with a terms of services booklet and a rate plan brochure, each of which discloses usage restrictions associated with AT&T’s plans. The assertion that consumers are, nonetheless, unaware of these restrictions is wholly unsubstantiated and therefore cannot be the basis for Commission intervention.<sup>81</sup>

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<sup>78</sup> See *id.* ¶ 47.

<sup>79</sup> See also Verizon Wireless Comments at 27-28.

<sup>80</sup> Public Interest Spectrum Comments at 9; see Consumers Union Comments at 4.

<sup>81</sup> See AT&T Comments at 39-40.

5. *Handset and Application Certification.* As AT&T has established, reasonable certification procedures – both for handsets and applications – are crucial network management tools. Those procedures, AT&T explained, are a vital part of wireless carriers’ ongoing efforts to maintain the integrity, security, and efficiency of wireless networks.<sup>82</sup>

Here again, the record confirms the importance of certification procedures, and no commenter provides any evidence to the contrary. Sprint, for example, points out (at 7) that “wireless handsets are an integrated and living part of the network.” Likewise, a paper by Dr. Charles Jackson submitted by CTIA explains that “the handset and the network are not two separate products – as are automobiles and gasoline or shoes and shoe polish – but are aspects of a single product.”<sup>83</sup> Dr. Jackson further explains that “[t]he features and quality of a handset are inextricably intertwined with the quality of the wireless service,” and, for that reason, “a wireless service provider has strong incentives to control the technology used in handsets in order to create an efficient network as well [as] to manage network evolution.”<sup>84</sup> Certification of the handset – along with applications that run on the handset and access network resources – are therefore best understood as a means of network management that carriers undertake in order to ensure the provision of high-quality, reliable service and to protect the network from harm.

**B. Additional Practices Identified by Commenters Do Not Warrant Regulation**

Unable to defend Skype’s call for regulation on its own terms, some commenters refer to other practices not identified by Skype, apparently as a justification for Commission

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<sup>82</sup> See *id.* at 58-63.

<sup>83</sup> Charles L. Jackson, *Wireless Handsets Are Part of the Network* 1 (Apr. 27, 2007), Attachment C to CTIA Comments.

<sup>84</sup> *Id.* at 1, 43.

intervention. These practices likewise provide no basis for the regulatory intervention that Skype seeks.

1. *Early Termination Fees.* Some commenters claim that early terminations fees (“ETFs”) lock-in customers to specific carriers and are thus anticompetitive.<sup>85</sup> But, apart from being unrelated to whether *Carterfone* should be extended to the wireless industry, ETFs serve pro-consumer ends. As with locking, ETFs are a means for wireless carriers to recoup the substantial costs incurred in subsidizing handsets, which, as explained, serves the pro-consumer ends of driving penetration of handsets and services. In addition, ETFs allow carriers to provide lower rates by giving carriers certain and stable revenue flows, and by providing compensation for lost revenue and up-front costs caused by early termination.<sup>86</sup>

Commenters’ concern with ETFs is particularly misplaced given that ETF practices vary among carriers and many carriers offer consumers a variety of plans, “including prepaid plans, contract plans (of varying lengths), as well as month-to-month service plans. Some of these plans include [ETFs] as components, and some do not.”<sup>87</sup> AT&T, for example, offers a 30-day trial window in which ETFs are not applied for any plan. In addition, AT&T offers “Pay as You Go” and “GoPhone Pick Your Plan” plans that do not involve service commitments or ETFs.<sup>88</sup>

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<sup>85</sup> See Public Interest Spectrum Comments at 4; Consumers Union Comments at i, 4.

<sup>86</sup> See [http://www.ctia.org/advocacy/position\\_papers/index.cfm/AID/10301](http://www.ctia.org/advocacy/position_papers/index.cfm/AID/10301) (quoting Dr. Jerry Hausman, the MacDonald Professor of Economics at MIT: “The ETF reduces carriers’ costs of serving all customers by reducing transaction costs, and the wireless industry is intensely competitive. Thus, prohibiting carriers from charging ETFs will cause prices for wireless services and/or equipment to be higher than they otherwise would have been.”).

<sup>87</sup> *Id.*

<sup>88</sup> See <http://www.cingular.com/cell-phone-service//cell-phone-plans/pyg-cell-phone-plans.jsp> (Pay as You Go); <http://www.cingular.com/cell-phone-service//cell-phone-plans/pyp-cell-phone-plans.jsp> (GoPhone Pick Your Plan).

In addition, contrary to commenters' suggestion, information regarding ETFs is readily available to consumers. AT&T has adopted the CTIA Consumer Information Code, pursuant to which AT&T makes available to subscribers important terms of rate plans, including "any early termination fee that applies and the trial period during which no early termination fee will apply."<sup>89</sup> Commenters do not – presumably because they cannot – point to any evidence to suggest that ETFs are unknown to consumers.

2. *Exclusive Agreements.* Some commenters also express concern about exclusive arrangements between carriers and third-party content providers and handset manufacturers. Consumers Union, for example, maintains (at 3-4) that such deals "deter[ ] [consumers] from switching" carriers. These claims are wide of the mark.

In a competitive market, exclusive vertical arrangements drive competition and provide no basis for regulatory intervention. As explained above and in AT&T's opening comments, the overriding point here is that carriers are aggressively competing to win and to retain as many customers as possible. Unique content and innovative handsets – especially when exclusively offered – are ways that carriers compete to win and keep customers. But exclusive agreements are hardly a sign of market failure: to the contrary, such agreements exemplify the way that carriers compete vigorously to win customers. In addition, exclusive agreements have important efficiencies: they enable carriers to sell services and handsets calibrated precisely to work with a carrier's network and other services in the most efficient and optimal manner, and they also can help justify the substantial investment that is often required to bring an innovative service or device to market. As Dr. Schwartz explains – and as the courts have confirmed – "[s]ound economic policy . . . displays broad tolerance for exclusivity relations . . . in markets

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<sup>89</sup> <http://www.cingular.com/learn/articles-resources/consumer-code.jsp>.

characterized by significant rivalry,” in part because such arrangements “can have important pro-consumer benefits, for example, through encouraging closer collaboration and investments by both parties.”<sup>90</sup>

## CONCLUSION

For the reasons provided in AT&T’s opening comments and in these reply comments, Skype’s request for a declaratory ruling that *Carterfone* should be applied to the wireless industry should be denied. The Commission should also deny Skype’s request to initiate a rulemaking proceeding to investigate the wireless industry.

Respectfully submitted,

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<sup>90</sup> Schwartz & Mini at 26; *see also, e.g., Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717, 736 (7th Cir. 2004) (vertical exclusive agreements are “presumptively legal” and the courts “often approve” of “exclusive dealing” “because of their procompetitive benefits”).